92-1228

Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

REPUBLIC NATIONAL BANK,
Petitioner,

v.

AMWEST SURETY INSURANCE COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court of appeals may, without violating the due process requirements of the Fifth Amendment to the United States Constitution, reverse a judgment of a district court upon grounds which had not been presented to either court nor briefed on appeal.

2. Whether a beneficiary under a letter of credit who falsely certifies that the conditions of the letter of credit have been satisfied is entitled, under a theory of unjust enrichment, to retain the proceeds of the letter of credit, notwithstanding the warranty provisions of § 5-111(1) of the Uniform Commercial Code as enacted in South Carolina and codified at S.C. Code Ann. § 36-5-111(1) (1977).

3. Whether proceeds of a letter of credit may be awarded to the beneficiary in order to prevent the issuer from receiving a "windfall," although the beneficiary has no independent legal right to possession of the proceeds and although strict compliance with the conditions of the letter of credit would entitle the issuer to possession of the proceeds.

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PETITION FOR A WRIT OF CERTIORARI

Republic National Bank petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 977 F.2d 122, and reprinted at Pet. App. 1a. The order of the United States District Court for the District of South Carolina is unpublished, and reprinted at Pet. App. 19a.

JURISDICTION

The Court of Appeals entered judgment on October 1, 1992, and denied petitioner's petition for rehearing and suggestion for rehearing en banc on October 27, 1992.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved in this case is the Fifth Amendment, U.S. CONST. Amend. V, which is reprinted in Pet. App. D. The statutory provisions involved in this case are South Carolina Code Ann. §§ 36-5-108(3)(a), 36-5-111(1), and 36-5-114(2)(b) (1977), which are also reprinted in Pet. App. D.

STATEMENT

This case involves a beneficiary which improperly drew against a letter of credit by means of a false certification that the conditions of the letter of credit had been met. Reversing the district court, the court of appeals held that a beneficiary of a letter of credit does not warrant the truth of statements contained in its draw request and, thus, that the beneficiary in this case was entitled to retain the proceeds of the letter of credit, notwithstanding the fact that the conditions of the letter of credit had not been satisfied.

1. Petitioner Republic National Bank (Republic) issued a standby letter of credit in the amount of $160,000.00 in favor of respondent Amwest Surety Insurance Company (Amwest), the beneficiary.[1] The purpose of the letter of credit was to partially secure Amwest against losses which it might incur in the event that it was to pay claims against payment and performance bonds which it issued in favor of B&F Contractors, Inc.

[1] Petitioner Republic is the wholly-owned subsidiary of Resource BancShares, Inc., the shares of which are not publicly traded. Neither Republic nor Resource BancShares, Inc., have any non-wholly-owned subsidiaries. The parties at the judgment stage in the district court and in the court of appeals are all reflected in the caption.

(B&F), the account debtor. When the letter of credit was issued, B&F executed a demand promissory note to Republic in the amount of $160,000.00. Pet. App. 3a-4a.

On May 8, 1989, Amwest submitted a draw request for the full $160,000.00. At that time, however, only $38,000.00 in claims had been made against the bonds. Republic honored the draw request immediately by paying Amwest $160,000.00, thereby discharging the letter of credit and establishing B&F's liability for the full amount of its note. When B&F discovered that the draw exceeded claims by $122,000.00, it complained to Amwest. Amwest thereupon returned $122,000.00 to Republic, requesting that the money be placed "back into" the letter of credit. B&F issued conflicting instructions, directing Republic to apply the $122,000.00 in order to reduce its liability on the note. Republic followed B&F's instructions and refused Amwest's request. Amwest later attempted to draw against the letter of credit again, but its drafts were not honored by Republic. Pet. App. 4a-5a.

2. Because of Republic's refusal to honor the draw request or to return the funds, Amwest initiated this action in federal district court against Republic, alleging state law claims for breach of express contract, breach of implied contract, bad faith, fraud and unjust enrichment. The fraud and bad faith claims were dismissed by the lower court pursuant to Fed.R.Civ.P. 12(b)(6). The district court granted petitioner's motion for summary judgment on the remaining claims. It held that Amwest's certification of a draw request in the amount of $160,000.00 against claims of $38,000.00 violated the warranty provisions of the UCC, codified at S.C. Code Ann. § 36-5-111(1) (1977), thereby entitling Republic to possession of the funds. Pet. App. 24a.

The court of appeals reversed so much of the district court's order as entered judgment in favor of Republic on the issue of unjust enrichment and then held that

Amwest was entitled to restitution in the amount of $122,000.00. The court's finding of unjust enrichment was premised upon alternative grounds. Pet. App. 10a-18a.

First, the Fourth Circuit concluded that Amwest was legally entitled to possession because, contrary to the district court's decision, its draw request did not breach the § 5-111(1) warranty. *Id.* at 11a-15a. This conclusion in turn rested upon the holding that a beneficiary does not warrant the truth of statements made in its draw request. *Id.* at 14a-15a. As a result, a facially complying, though false, draft was held sufficient to entitle the beneficiary to the proceeds of the letter of credit, notwithstanding the fact that, contrary to the draw request, all conditions of the letter of credit had not been satisfied. There being no alleged breach of warranty in the court's view, there was no legal impediment to Amwest's possession of the funds. *Id.* at 15a.

The Fourth Circuit's alternative ground for decision was that even if Amwest had breached the § 5-111(1) warranty, restitution of the funds to Amwest was necessary in order to prevent Republic from receiving a "windfall." *Id.* at 15a-18a.

3. Republic petitioned for rehearing on October 13, 1992, asserting two general grounds for review. First, Republic attempted to identify legal, factual and conceptual errors in the opinion. Second, Republic called the Fourth Circuit's attention to the fact that neither of the legal theories underpinning its decision had been asserted at the trial level or on appeal, with the result that failure to grant a rehearing would constitute a denial of due process as guaranteed by the Fifth Amendment to the United States Constitution.

Republic's petition for rehearing was denied on October 27, 1992. Pet. App. C.

REASONS FOR GRANTING THE WRIT

The principal justification for review is that petitioner has never had the opportunity to address either of the theories which formed the basis for the Fourth Circuit's decision. The result, under clear precedent of this Court, is that petitioner has been deprived of due process of law as guaranteed by the Fifth Amendment to the United States Constitution. Considering the fact that the approach adopted by the Fourth Circuit in reversing the district court constitutes a radical departure from long-standing letter of credit law, its reliance upon legal theories which were never tried or briefed becomes all the more unjustifiable.

Indeed, the Fourth Circuit's reasoning may have profound consequences upon interstate and foreign commerce given the nature of the instruments involved and notwithstanding the fact that, strictly speaking, the court purported to decide only issues of state law.[2] By holding that a beneficiary does not warrant the truth and accuracy of its draw request and by relying upon one of the most subjective of all equitable principles, the "windfall" doctrine, in order to determine the parties' rights, the Fourth Circuit may have subverted the very features which invest letters of credit with their commercial vitality.

Petitioner therefore submits that the writ of certiorari should be granted both to permit it to have its day in court with respect to the grounds relied upon by the

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[2] As eloquently postulated by one federal appellate judge:

> Though the instant case is a diversity case and "writing in diversity we write on the wind," [citation omitted], the precedential force of the majority opinion is likely to be great considering the field of law and the stature of the author. It distresses me to think that the once useful device of letters of credit may be a less reliable device now.

Philadelphia Gear Corp. v. Central Bank, 717 F.2d 230, 242 (5th Cir. 1983) (Goldberg, J., dissenting).

Fourth Circuit and to prevent an unwarranted and unwise departure from legal principles which are necessary to the efficient functioning of important lines of commerce.

1. The only claim upon which the Fourth Circuit held Amwest to be entitled to relief was that for unjust enrichment. Instead of finding error with the lower court's treatment of the grounds asserted by Amwest in support of that claim, the Fourth Circuit based its reversal upon findings that Amwest had not warranted the truth of its draw request and that affirmance would result in a "windfall" to Republic.

As mentioned above, these two grounds had not appeared in this case until the Fourth Circuit announced its opinion. Moreover, in relying upon these grounds, the Fourth Circuit implicitly decided as matters of fact that Amwest had not warranted the truth of its draw request and that retention of the disputed funds by Republic under all of the facts of this case would have been so inequitable as to amount to a windfall. Because Republic has never had notice that it might be required to meet these grounds, it has had no opportunity to develop and to present evidence on the fact issues which they raise. Finally, because both grounds had been waived as a basis for reversal due to Amwest's failure to assert them at trial or on appeal,[3] the Fourth Circuit's decision arbitrarily deprived Republic of the benefit of that waiver. The effect of the Fourth Circuit's refusal

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[3] Questions which are not raised at trial are normally not eligible for consideration on appeal. Levy v. Kindred, 854 F.2d 682, 684-85 (4th Cir. 1989). Further, in order for an issue to be decided on appeal, it must be briefed. Arnold v. Eastern Air Lines, Inc., 681 F.2d 186, 206 n.22 (4th Cir. 1982). Issues which are not so presented are waived on appeal, and the ruling of the lower court, explicit or implicit, becomes the "law of the case." Williamsburg Wax Museum v. Historic Figures, Inc., 810 F.2d 243, 250 (D.C. Cir. 1987).

to grant a rehearing has therefore deprived Republic of due process of law.

The applicable principle was stated by this Court long ago in *Saunders v. Shaw*, 244 U.S. 317 (1917). In *Saunders* the petitioner sought review, *inter alia*, on the ground that the Supreme Court of Louisiana reversed the judgment of the lower court upon facts as to which the petitioner had been denied the opportunity to contest. When the Supreme Court of Louisiana refused to grant his petition for rehearing, he sought review on the ground that he had been denied due process of law as guaranteed by the Fourteenth Amendment.

In granting review and reversing the Louisiana court, this Court reasoned that

> when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here . . . . The denial of rights given by the 14th Amendment need not be by legislation.

244 U.S. at 320. Applicability of the rule in *Saunders v. Shaw* to due process deprivations under the Fifth Amendment by federal courts of appeal was expressly recognized in *Helis v. Ward*, 308 U.S. 365, 369-70 (1939). While the claimed constitutional infraction in *Helis* was ultimately found not to have been properly preserved as a ground for reversal, thereby requiring affirmance of the court of appeals' decision, it did constitute a proper ground for granting certiorari, even though the court of appeals' decision involved only issues of state law.

Together, the *Saunders* and *Helis* decisions stand for the proposition that where, as in this case, a court of appeals surprises the petitioner by deciding a case on grounds upon which the petitioner has never had an

opportunity to be heard and then denies the petitioner's request for rehearing on those grounds, a denial of due process indisputably occurs. Because the due process violation was asserted by Republic as a ground for rehearing, the issue is preserved for consideration by this Court. *See Helis v. Ward*, 308 U.S. at 369-70.

The discussion below of the other issues presented by this petition reveals that they are neither trivial nor purely of interest within the State of South Carolina. To the contrary, the Fourth Circuit's decision could significantly impact the courses of interstate and foreign commerce because of the dependency of certain types of transactions upon letters of credit. Thus, although the constitutional deprivation which has occurred is personal to the petitioner, many others will likely feel the effect of the Court's decision on the writ.

Given the importance of the issues decided by the court of appeals, they should not have been decided without first being exposed to trial, briefing and argument. In any event, Republic submits that, at the least, the due process violation which has occurred amply supports granting the writ.[4] Moreover, even if this Court were to affirm the Fourth Circuit's conclusions regarding the need for an express warranty of truthfulness and the applicability of the "windfall" theory to letter of credit cases, Republic would be entitled to a trial on those issues. On the other hand, were the Court to conclude that grounds relied upon by the Fourth Circuit have been waived, this case may be a proper one for summary reversal under Sup. Ct. R. 16.1.

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[4] Aside from the constitutional problems caused by the Fourth Circuit's actions, review would also appear to be appropriate under Sup. Ct. R. 10.1(a) on the ground that the Fourth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

2. The Fourth Circuit acknowledged as a conceptual matter that restitution of the funds to Amwest would require a finding that they did in fact belong to Amwest. *See* Pet. App. 11a-15a. The district court held that the funds did not belong to Amwest because it had obtained them in violation of the § 5-111(1) warranty. *See* Pet. App. 24a-25a. In reversing, however, the Fourth Circuit entered the unprecedented ruling that a beneficiary does *not* warrant the truth of any statements which it might make to the issuer in order to satisfy the conditions of the letter of credit. Pet. App. 14a-15a. Not only does this ruling jeopardize the requirements of certainty (discussed more fully in the following section) upon which all letters of credit depend, it conflicts directly with existing law in most jurisdictions and changes the terms of the agreement between issuer and beneficiary.

The Fourth Circuit's holding that a beneficiary does not warrant the truth of assertions that it has complied with the conditions of the letter of credit can have no effects other than to encourage fraud and/or negligence in the performance of conditions required by the letter of credit.[5] More important, the decision endangers important interests of issuing banks. In agreeing to issue a standby letter of credit such as the one at issue in this case, a bank accepts risk only to the extent that the account debtor may default on its obligations to the beneficiary, thereby necessitating a draw against the letter of credit to the extent of the default.[6] The Fourth Cir-

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[5] The Fourth Circuit's opinion, therefore, undercuts a public policy, recognized by other courts, of preventing deception in letter of credit transactions. *See* Universal Marine Insurance Co. v. Beacon Insurance Co., 581 F.Supp. 1131, 1139 (W.D.N.C. 1984); Larson v. First Interstate Bank of Arizona, N.A., 603 F.Supp. 467, 470 (D.Ariz. 1983).

[6] *See* Airline Reporting Corp. v. First Nat. Bank of Holly Hill, 832 F.2d 823, 826-27 (4th Cir. 1987); *see, generally,* N. J. Ruben-

cuit now imposes upon the issuer additional risks which result when the beneficiary abuses its rights or neglects its obligations under the conditions of the credit. The imposition of these unbargained-for risks is contrary to commercial practice and instills additional elements of uncertainty into the transaction which can be expected to make issuers more reluctant to issue letters of credit. *See* pp. 12-14 *infra*.

One would expect that a decision which decides important issues of letter of credit law and in fact changes the obligations of parties to a letter of credit transaction would be based upon clear precedent. Unfortunately, however, the decision below relies almost entirely upon two cases, neither of which addressed the issue before the court. Rather than refusing to recognize that a beneficiary, by submitting a draw request, warrants its truth, the intermediate appellate court in *Delta Brands, Inc. v. MBank Dallas, N.A.*, 719 S.W. 2d 355 (Tex. Ct. App. 1986), simply confirmed that a beneficiary also warrants that documents are facially complying *and* that there are no conditions excusing payment under § 5-114(2)(b). *Id.* at 359. The conditions set forth in § 5-114(2)(b) specifically include fraud. *See* S.C. Code Ann. § 36-5-114(2)(b) (1977). Nothing in the *Delta Brands* decision even remotely suggests that a beneficiary makes no warranties other than those which were there under consideration. The only other case relied upon by the Fourth Circuit similarly did not address the issue and, therefore, did not hold that a beneficiary does not warrant the truth of its statements. *See Philadelphia Gear Corp. v. Central Bank*, 717 F.2d 230, 236 (5th Cir. 1983).

It should be recognized as well that in a case discussed in the opinion below, the Supreme Court of Texas con-

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stein, *The Issuer's Rights and Obligations Under a Letter of Credit*, 17 Uniform Commercial Code L.J. 129, 132 (1984).

cluded that truth was warranted in all draw requests. Moreover, the Texas court surveyed existing law before forming its opinion. Based upon that survey, it concluded:

> All authorities which have addressed the issue agree that under section 5.111(a) a beneficiary warrants that all statements made in documents presented to obtain payment are true. *See Barclay Int'l v. First Alabama Bank*, 557 So.2d 1201, 1206 (Ala. 1989); *Brown v. United States Nat'l Bank*, 220 Neb. 684, 371 N.W.2d 692, 701 (1985); *Pubali Bank v. City Nat'l Bank*, 676 F.2d 1326, 1328-29 (9th Cir. 1982), *opinion following remand*, 777 F.2d 1340 (9th Cir. 1985); *Mellon Bank v. General Elec. Credit Corp.*, 724 F.Supp. 360, 363 (W.D.Pa. 1989); [L.] WEERAMANTRY [& W. SCHLICHTING, IX BANKING LAW] § 234.08, at 234-54 to 234-55 [1990]; Dolan, [*Letters of Credit, Article 5 Warranties, Fraud, and the Beneficiary's Certificate*, 41 BUS. LAW. 347,] at 349 (1986)].

Sun Marine Terminals v. Artoc Bank & Trust, 797 S.W.2d 7, 11 (Tex. 1990).

Because the Fourth Circuit's refusal to recognize that a beneficiary warrants the truth of its draw requests under § 5-111(1) of the UCC has important commercial ramifications and because it is in apparent conflict with most, if not all, authorities which have addressed the issue, it should be reexamined by this Court.

3. The Fourth Circuit's alternative ground for reversal is that even assuming *arguendo* that the § 5-111 (1) warranty had been breached by Amwest, restitution of the disputed funds to Amwest should nonetheless be ordered in order to prevent Republic from receiving a "windfall." Determination of the existence of a windfall by its nature involves a highly subjective weighing of the equities between two parties for the purpose of determining which of them is more deserving. It therefore

involves precisely the type of case-by-case process of decision that has no place in letter of credit law.[7]

By their nature and due to the laws which govern their use, letters of credit attempt to fix the parties' respective obligations and risks with certainty. It is this need for certainty which, above all, must be protected by the courts and which can be achieved only through the enforcement of strict compliance to the conditions of the credit.

As one commentator has explained:

> When courts lose touch with commercial realities that underlie a given device, they inevitably create commercial law that is abstract, artificial and out of touch with the needs and realities of the marketplace. The standard of strict compliance is first and foremost a rule of letter of credit practice. It is from that practice, and not the legal system, that its universality flows. Courts invite trouble when they depart from the tried and true norms of practice to create a technically "better" but practically different rule.

J. E. Byrne, *Letters of Credit*, 43 The Business Lawyer 1353, 1357 (1988). Similarly, it has been recognized that

> the letter of credit is best understood not as an ordinary contract but as a mercantile specialty that imposes a unique statutory obligation upon issuer and is driven solely by what appears on the face of beneficiary's presented documents and in the letter of credit itself. Neither the law of contracts nor its

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[7] As a conceptual matter, once a breach of warranty is assumed to have occurred, a "windfall" theory cannot be logically applied. As noted above, the Fourth Circuit conceded that in order for the funds to be restored to Amwest under a theory of unjust enrichment, they must "belong" to Amwest. Pet. App. 11a. Since a finding that the warranty had been breached would prevent the conclusion that the funds belonged to Amwest, the Fourth Circuit's application of the "windfall" theory results in the restoration to Amwest of funds which were not its property to begin with.

> notions of equity should be permitted to interfere with the arbitrary rules governing letters of credit.

A. J. Givray, *Letters of Credit*, 45 The Business Lawyer 2381, 2394-95 (1990).

The consequences of judicial fashioning of letter of credit law upon issuing banks are also clear.

> Credits require precision and it is dangerous for courts, unguided by the dictates of commerce, to pick and choose what should be given effect and what should not. When a bank issues a credit, it undertakes a specified risk and no other, and that should be the legal character of its undertaking.

Byrne, 43 The Business Lawyer at 1359. It follows then that

> [b]anks would be less willing to become involved in letter-of-credit transactions if their decisions in doubtful cases were second guessed by the courts. Commercial transactions that rely on letters of credit would suffer as a result.

N. J. Rubenstein, *The Issuer's Rights and Obligations Under a Letter of Credit*, 17 Uniform Commercial Code L. J. 129, 155 (1984).

In disregard of these troublesome consequences, the Fourth Circuit has done precisely that which commercial experts have pleaded with the courts to avoid at all costs. The court's apparent concern for achieving what it considered to be a fair result[8] does not justify its actions. The proper emphasis has been explained as follows:

> Although strict adherence to the requirements of a letter of credit may cause inequitable results in some circumstances, the value of certainty outweighs this

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[8] Republic, of course, does not concede that the result reached by the Fourth Circuit was fair nor that a decision in favor of Republic would have produced an inequitable result. Just the opposite.

> problem and justifies adherence to the requirement of strict compliance.

Rubenstein, 17 Uniform Commercial Code L. J. at 152. For such reasons, other courts of appeal (to include another panel of the Fourth Circuit) have required strict compliance with the conditions of the letter of credit. *See, e.g., Courtaulds North America, Inc. v. North Carolina National Bank*, 528 F.2d 802, 805-806 (4th Cir. 1975); *Marino Industries v. Chase Manhattan Bank, N.A.*, 686 F.2d 112, 115 (2d Cir. 1982); *Insurance Company of North America v. Heritage Bank*, 595 F.2d 171, 174 (3d Cir. 1979).

If courts are to be permitted to base judgment in a letter of credit dispute upon an assessment of which party is more deserving, certainty in letter of credit transactions will become a thing of the past. The resulting adverse consequences to commerce fully justify further appellate review.

CONCLUSION

The petition for a writ of certiorari should be granted, and the decision of the court of appeals summarily reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-2713

AMWEST SURETY INSURANCE COMPANY,
Plaintiff-Appellant,

v.

REPUBLIC NATIONAL BANK,
Defendant-Appellee.

Appeal from the United States District Court
for the District of South Carolina, at Columbia
Matthew J. Perry, Jr., District Judge

(CA-89-3079-3-0)

Argued: June 1, 1992

Decided: October 1, 1992

Before WIDENER and NIEMEYER, Circuit Judges, and LEGG, United States District Judge for the District of Maryland, sitting by designation.

Affirmed in part, reversed in part, and remanded by published opinion. Judge Niemeyer wrote the opinion, in which Judge Widener and Judge Legg joined.

COUNSEL

ARGUED: Jeff B. Slagle, THOMPSON & SLAGLE, Norcross, Georgia, for Appellant. Harry Augustus Swagart, III, LAW OFFICES-HARRY A. SWAGART, III, P.A., Columbia, South Carolina, for Appellee.

OPINION

NIEMEYER, Circuit Judge:

In this diversity case Amwest Surety Insurance Company seeks to recover from Republic National Bank, of Columbia, South Carolina, funds that Amwest erroneously overdrew under a letter of credit and then returned with directions to "put [them] back into the . . . Letter of Credit." Amwest claims that when Republic National accepted the returned funds but refused to honor a subsequent draft on them, it breached its obligations under the letter, committed fraud, or was unjustly enriched. As a defense Republic National asserts that Amwest had breached its statutory presentment warranty. *See* S.C. Code Ann. § 36-5-111(1).

On cross-motions for summary judgment, the district court ruled that Republic National had discharged its obligations under the letter of credit when it honored the first draft in the full amount of the credit, and that the bank did not need to refund the $122,000 which Amwest had returned to the bank attempting partial reestablishment of the letter of credit.

While we agree with the district court's conclusion that the bank properly discharged its obligations under the letter of credit and did not defraud Amwest, we reverse its order denying Amwest's claim for the $122,000 and direct summary judgment for Amwest on its claim of unjust enrichment.

I

To withstand a motion for summary judgment supported by affidavits, the nonmoving party may not rest upon mere allegations or denials but must, by its "own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(c) & (e)). The following facts are either expressly conceded by both parties or supported by affidavits or depositions submitted by one party without similarly supported rebuttal by the other party.

In the Spring of 1988, B & F Contractors, Inc., of Hilton Head, South Carolina, submitted the winning bid to perform excavation and land grading work on a highway which The Hardaway Company, of Savannah, Georgia, was constructing for the Georgia Department of Transportation. As a part of the agreement between B & F Contractors and The Hardaway Company, B & F Contractors agreed to obtain a payment and performance bond for the benefit of The Hardaway Company. Amwest was willing to provide the requested bond, but required, along with other conditions, that B & F Contractors obtain a letter of credit for the benefit of Amwest.

With the assistance of First Sun South Corporation, whose relationship to B & F Contractors is unclear from the record, B & F Contractors had Republic National issue an irrevocable letter of credit in the amount of $160,000, naming Amwest as the beneficiary. Dated July 21, 1988, the letter of credit provided,

> We hereby authorize you [Amwest] to draw on Republic National Bank of Columbia, South Carolina up to an aggregate amount of $160,000 U.S. Dollars available by your drafts at sight in the event you deem it necessary by reason of your having executed bond(s) on behalf of B&F Contra[c]tors, Inc.
>
> * * * *

> We engage with you that all drafts drawn under and in compliance with the terms of this credit will be duly honored if presented at this office on or before 2/15/89 or any automatically extended date, as hereinabove set forth. We confirm credit and hereby undertake that all drafts drawn and presented will be duly honored by us.

To fund the letter of credit, B & F Contractors executed a demand note for $160,000 payable to Republic National, guaranteed by First Sun South, and secured by an assignment of the proceeds of B & F Contractors' contract with The Hardaway Company. Following receipt of the letter of credit, Amwest issued the payment and performance bond to The Hardaway Company.

In March 1989, The Hardaway Company informed Amwest that B & F Contractors was behind in paying its suppliers, a situation that was threatening its ability to continue performance of its bonded contract. After an investigation disclosed that B & F Contractors owed approximately $100,000 to its suppliers, Amwest determined that it would need to pay $38,000 immediately to certain suppliers to assure continued performance of the contract. It paid the $38,000 and looked to the letter of credit for reimbursement.

Mistakenly believing that the letter of credit authorized only drafts for its full amount, Amwest submitted the required documentation, including the original letter of credit, to Republic National on May 8, 1989, for the full $160,000. On the same day, the bank honored the draft, sending Amwest a check for the full amount. The next day, however, First Sun South, a guarantor of B & F Contractors' note, complained to Amwest that it had expected the draw to be only $38,000. Amwest called Republic National in an effort to reduce the amount of its draw, but the call was not returned. Amwest then sent Republic National a letter dated May 31, 1989, accom-

panied by a check in the amount of $122,000, explaining that the check was "to be put back into the . . . Letter of Credit," because the claims against the bond had "so far not exceeded the amount of $38,000."

First Sun South, meanwhile, told Republic National that Amwest was returning the $122,000 to reduce the amount due on B & F Contractors' Note to the bank. When the check arrived, the bank cashed it and, without Amwest's knowledge, applied the funds to the outstanding balance on the note. Several months later, on August 2, 1989, when B & F Contractors' defaults had continued, Amwest submitted documentation for a second draw under the letter of credit for $122,000, but Republic National refused to honor it, asserting that the letter of credit had been extinguished when the bank honored the first draft in May for the full value of the credit.

Amwest sued Republic National, claiming breach of express and implied contracts, fraud, unjust enrichment, and bad-faith litigiousness. The district court dismissed the counts of fraud and bad-faith litigiousness for failure to state a claim, and, ruling on cross-motions for summary judgment on the remaining counts, it rejected Amwest's other claims, directing judgment for Republic National. Amwest appealed, but abandoned its claim for bad-faith litigiousness.

II

Amwest's contractual arguments are based upon the letter of credit established by B & F Contractors and issued by Republic National in Amwest's favor. It contends that Republic National breached its obligations under the letter of credit when it refused to honor Amwest's August draft. The bank contends that its obligations under the letter of credit had been fully discharged when Amwest drew down the full amount of the credit in May.

Letters of credit have long been used to facilitate the financing of commercial transactions between buyers and sellers by providing a certain and reliable means to ensure payment for goods delivered or services rendered. As elsewhere, in South Carolina, whose law governs this diversity case, a letter of credit is a triparite arrangement under which one party establishes a credit, usually at a bank, on which it authorizes a third party to draw, provided certain conditions are met. The bank, as a mere stakeholder of the credit, issues a letter to the third party (known as the beneficiary) confirming the credit and stating the conditions for any draw to be made against it. In essence, the bank's promise to pay the beneficiary upon the beneficiary's timely presentation to the bank of documents conforming to the conditions delimited in the letter replaces the promise of the party which established the credit. *See Airline Reporting Corp. v. First Nat'l Bank*, 832 F.2d 823, 826 (4th Cir. 1987).

The virtues of letters of credit are their simplicity, reliability, and predictability, all of which depend upon the limitation of the issuer's duties to the ministerial application of a letter's terms. *See Philadelphia Gear Corp. v. Central Bank*, 717 F.2d 230, 236 (5th Cir. 1983); *see also Courtaulds North America, Inc. v. North Carolina Nat'l Bank*, 528 F.2d 802, 805 (4th Cir. 1975) (issuer's "duties and liability are governed exclusively by the terms of the letter"). Thus under the Uniform Commercial Code, which South Carolina has adopted, in addition to the ordinary duties of a bank, an issuer is only obliged (1) to examine carefully documents presented by the beneficiary for compliance with the terms of the letter of credit and, absent a facial defect, (2) to honor the draft if the documents do comply—regardless of whether the underlying contract between beneficiary and customer has, in fact, been performed, and without assuming any liability if the documents wrongly assert that it has. S.C. Code Ann. §§ 36-5-109(2) & 36-5-114(1). Correspondingly, duly honoring a draft discharges the issuer's

obligations "pro tanto," S.C. Code Ann. § 36-5-108(3)(a), and, unless otherwise agreed, entitles the issuer to "immediate reimbursement" by the customer of funds paid. S.C. Code Ann. § 36-5-114(3) & South Carolina Reporter's Comment.

A strict application of the South Carolina Code to the undisputed facts of this case reveals that Republic National met its obligations to Amwest under the letter of credit established by B & F Contractors for Amwest's benefit. Neither party disputes that Amwest's $160,000 draft on May 8, 1989, accompanied by a cover letter stating that claims had been made against B & F Contractors' bond complied with the terms of the letter of credit and that Republic National properly honored the draft with a check in the same amount. In doing so, the bank met its statutory obligation to honor facially complying drafts. *See* S.C. Code Ann. § 36-5-114(1). Since the amount paid was the full amount authorized by the letter of credit, Republic National was not obliged to honor any future drafts under the letter. *See* S.C. Code Ann. § 36-5-108(3)(a) (honor discharges issuer's obligations "pro tanto"). Consequently, the bank's dishonor three months later of Amwest's draft for $122,000 did not violate the letter of credit because, in effect, the letter had been discharged by payment on the first draft in the full amount authorized by the letter of credit.

Amwest contends, however, that the draft of May 8 was but the first half of a two-part transaction: The request for $160,000 on May 8 and the return of $122,000 on May 31, more than three weeks later, constituted a single draft of only $38,000 under the $160,000 letter of credit. Consequently, it argues, Republic National's dishonor of its draft in August 1989 for the remaining $122,000 breached the express contract created by the letter of credit. We cannot accept this attempt to avoid the plain language of the statute defining Republic National's obligations. Allowing beneficiaries to alter, after

the fact, the amounts explicitly requested in a facially complying draft would undermine the virtues of transparency and mechanical predictability upon which users of letters of credit rely. Moreover, as may have occurred in this case, a beneficiary's later attempt to "put back" part of a facially complying draft honored by the issuer may arise out of a dispute concerning the accuracy of the assertions in the draft about performance of the underlying contract between beneficiary and customer. Requiring the issuer to treat returned funds as reducing the amount drawn by the initial draft would thus violate the cardinal principle that the issuer of a letter of credit "is not to be embroiled in disputes between the buyer and the seller." *Courtaulds North America, Inc.*, 528 F.2d at 805.

Alternatively, Amwest contends that even if the letter of credit was discharged at the time of the first draft, it was reinstated to the extent of $122,000 when Amwest sent Republic National a check for $122,000 along with directions to "put [it] back into the . . . Letter of Credit," an offer the bank accepted by cashing the check without further response. We must also reject this argument. There is no evidence that B & F Contractors consented to either a modification of the original letter of credit or the creation of a new one. When rights are established under an irrevocable letter of credit, any modification to allow return of funds and reinstatement of payment obligations after statutory discharge requires the consent of the parties, *see* S.C. Code Ann. § 36-5-106(2), unless, perhaps, there was a finding that the discharge was the result of a clerical error. Similarly, although the South Carolina Code does not explicitly address the subject, it is self-evident that all parties' consent would also be required to create a new letter of credit even if it was under the terms of the original, since any such new letter of credit would impose new, albeit similar, obligations. *See* S.C. Code Ann. § 36-5-106 & South Carolina Reporter's Comment. Because B & F

Contractors consented only to the original letter of credit, which did not provide for Amwest to reinstate it some three weeks after its discharge, Amwest's return of some of the funds it drew cannot be considered to have obligated the bank to honor a later draft under the letter of credit.

III

The district court also properly dismissed Amwest's assertion of fraud for failure to state a claim. To state a claim of fraud in South Carolina, the plaintiff must allege:

> (1) a representation; (2) falsity; (3) its materiality; (4) knowledge of the falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance upon the truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

Moorhead v. First Piedmont Bank & Trust Co., 256 S.E. 2d 414, 416 (S.C. 1979). Amwest contends that Republic National's cashing of Amwest's $122,000 check accompanied by directions that the funds "be put back into the . . . Letter of Credit" constituted a false representation that the bank would reinstate the letter of credit. Even assuming that silence under these circumstances can constitute a fraudulent misrepresentation of fact, *cf. Gardner v. Nash*, 82 S.E.2d 123, 127 (S.C. 1954) (silence while owner explained to third-party bidders at forced auction that defendant would bid for him, leading to low winning bid by defendant, who then refused to give property to owner), Amwest failed to allege that it relied upon this silence in any way. Amwest's delivery to the bank of the $122,000 preceded the silence, and so could not constitute reliance. Nor could any payments by Amwest on claims brought after this event under B & F Contractors' bond constitute reliance, since the obligation

to make them arose upon issuance of the bond, before Republic National's silent cashing of Amwest's check. Without reaching the question of whether other elements of the tort were proved, we are satisfied that the district court properly dismissed, for failure to state a claim, Amwest's allegations of fraud.

IV

While the district court's rulings on Amwest's claims of breach of express and implied contract based on the letter of credit and its fraud claim were proper, we conclude that the district court erred in granting summary judgment against Amwest on its claim for restitution of the $122,000 it gave Republic National.

In South Carolina, " 'the object to be attained in proceedings for restitution is the prevention of unjust enrichment of defendant and the securing for plaintiff of that to which he is justly and in good conscience entitled. . . . . [I]f one obtains the property or the proceeds of property of another, without a right to do so, restitution in a proper case can be compelled.' " *Harper v. McCoy*, 276 S.E.2d 782, 783-84 (S.C. 1981) (quoting 77 C.J.S. *Restitution* at 322-323). Courts thus require

> (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by defendant of the benefit under conditions that make it inequitable for him to retain it without paying its value.

Ellis v. Smith Grading & Paving, Inc., 366 S.E.2d 12, 15 (S.C. Ct. App. 1988).

Republic National does not dispute that it received $122,000 from Amwest, accompanied by a letter instructing the bank to put the funds "back into the . . . Letter of Credit," then retained the funds despite a subsequent demand for their return, in the form of a draft nearly

identical to a previous one which the bank contends fully complied with the terms of the letter of credit. If the funds Republic National received from Amwest belonged to Amwest, then these undisputed facts constitute unjust enrichment.

Republic National argues, however, that the money was not Amwest's to begin with, but belonged instead to the bank, and so the bank received no inequitable benefit when Amwest returned it. According to Republic National, although the original draft *facially complied* with the terms of the letter, Amwest had not *in fact* "*deem*[*ed* the draft] necessary by reason of [Amwest's] having executed bond(s) on behalf of B & F Contra[c]tors, Inc.," and thus it had violated its statutory warranty "to all interested parties that the necessary conditions of the credit [had] been complied with." S.C. Code Ann. § 36-5-111(1).

A

No court in South Carolina has interpreted this warranty provision of Article 5 of the U.C.C., and the commentary of the official reporter and South Carolina's reporter do little more than reiterate the language of the provision. *See* S.C. Code Ann. § 36-5-111(1), Official Comment & South Carolina Reporter's Comments. Moreover, few other courts have considered the provision.

The courts that have addressed the issue agree that, once an issuer pays a draft on a letter of credit, it becomes an "interested party" able to avail itself of the beneficiary's warranty under Article 5. *See, e.g., Pubali Bank v. City Nat'l Bank*, 676 F.2d 1326, 1329 n.5 (9th Cir. 1982). Courts differ, however, on what the beneficiary actually warrants to an issuer. Some have held that "a beneficiary warrants to the issuing bank the truth of the statements necessary to a draw on the credit." *Mellon Bank, N.A. v. General Elec. Credit Corp.*, 724 F.Supp. 360, 363 (W.D. Pa. 1989); *see also Sun Marine*

Terminals, Inc v. Artoc Bank & Trust, Ltd., 797 S.W.2d 7, 11 (Tex. 1990); *Brown v. United States Nat'l Bank*, 371 N.W.2d 692, 701 (Neb. 1985) (assuming that the beneficiary warrants that asserted facts are true); *Pubali Bank*, 676 F.2d at 1329 (same); John F. Dolan, *Letters of Credit, Article 5 Warranties, Fraud, and the Beneficiary's Certificate*, 41 Bus. Law. 347, 349 (1986). But others have held that the beneficiary warrants only the genuineness of documents and signatures submitted with a draft and "that the documents do strictly comply with the terms of the letter of credit." *Delta Brands, Inc. v. MBank Dallas, N.A.*, 719 S.W.2d 355, 359 (Tx. Ct. App. 1986), *implicitly overruled by Sun Marine Terminals v. Artoc Bank & Trust*, 797 S.W.2d at 11. *Compare Philadelphia Gear*, 717 F.2d at 238 (5th Cir. 1983) (considering knowing tender of drafts not complying with conditions of letter of credit to violate U.C.C. § 5-111(1), La. Rev. Stat. § 10:5-111), *with* 2 James J. White & Robert S. Summers, *Uniform Commercial Code* § 19-12, at 11 (3d ed. Supp. 1991) (noting "confusion" and "frightening implications" of expansive interpretation of beneficiary's warranty).

We think that the latter understanding of the beneficiary's warranty is the correct one, and we therefore hold that the beneficiary of a letter of credit, when drawing on the credit, only warrants to the bank that the presenting documents are genuine and comply with the terms of the letter of credit. In other words, the beneficiary only promises that the bank will not be failing in its duty to its customer by paying on the draft. We conclude that this result is required for several reasons.

First, a careful reading of the statute creating this warranty reveals that it is "the necessary conditions *of the credit*" that the beneficiary warrants "have been complied with." S.C. Code Ann. § 36-5-111(1) (emphasis added). Elsewhere the Code uses nearly identical language to define letters of credit, *see* 36-5-103(1)(a)

("engagement . . . that the issuer will honor drafts . . . upon compliance with the conditions specified in the credit"), and to delimit the issuer's obligation to honor drafts, *see* S.C. Code Ann. § 36-5-114(1) ("issuer must honor a draft . . . which complies with the terms of the relevant credit"). We think there can be no doubt that the conditions and compliance referred to in § 36-5-111 (1) are the same. On the one hand, then, the most natural reading of this language is that the beneficiary warrants that its draft complies with the conditions listed in the letter of credit—in the usual case, that documents required to be presented have been presented and statements required to be made have been made. On the other hand, only if the list of conditions in a letter of credit includes one of veracity can one say that a condition has not been complied with when an assertion by the beneficiary that is required by the letter of credit turns out to be false. Consequently, since only very few letters of credit include conditions of veracity, the general conclusion that any assertions required by a letter of credit must also be true in order to comply is not supported by the language of the Code.

Second, and more important, interpreting the beneficiary's warranty to allow issuers to recover funds they have paid in honoring a complying draft based on the veracity of included statements conflicts with the independence principle—that, to render certain and predictable the beneficiary's access to the credit, the issuer must be obliged only to examine for strict compliance with the terms of the letter and not to investigate any underlying dispute between the parties. Since most assertions of fact required by letters of credit concern the performance of the underlying contract between the beneficiary and the customer, allowing the issuer to recover funds paid on a draft because of the falsity of such assertions amounts to allowing the issuer to recover because of nonperformance of the underlying contract. This interpre-

tation would undermine "the intermediary character of the persons moving the documents from the beneficiary to the customer," S.C. Code Ann. § 36-5-111(1), Official Comment, and transform the issuer into a third party meddling in the underlying contractual relations. While it has been argued that letters of credit are used merely to ensure that beneficiaries have ready access to the money during any dispute about the underlying contract, *see Mellon Bank*, 724 F. Supp. at 365, that argument cannot be extended to enable someone other than the customer to raise such a dispute. But, in the eyes of the beneficiary, that would be the result of a warranty of truthfulness. The issuer would also be able to avoid the statutory bar to asserting the beneficiary's nonperformance of the underlying contract as a defense to a beneficiary's draw on a letter of credit in the absence of a facial defect. *See* S.C. Code Ann. § 36-5-114. The beneficiary loses the benefit of the letter of credit if the issuer can circumvent the independence principle and the statutory requirement to pay regardless of performance on the underlying contract simply by paying the draft and then seeking return of the money on a claim that the beneficiary breached its underlying contractual obligations to the customer.

Finally, rejecting the view that beneficiaries warrant the truth of statements required to draw on a letter of credit would not render the warranty provision nugatory, as one court has argued. *See Mellon Bank*, 724 F. Supp. at 365. The obligation of customers to reimburse issuers for honoring drafts only arises for drafts that comply. *See* S.C. Code Ann. § 36-5-114(3). Consequently, under our understanding, the beneficiary's warranty protects the issuer against the customer's refusal to reimburse because the honor was wrongful, despite the issuer's good faith effort to determine that the documents presented comply. *See* S.C. Code Ann. § 36-5-109(1); *see also* S. C. Code Ann. § 36-1-203 (general obligation of

good faith in execution of duties under the U.C.C.). Nor do issuers need a warranty that all statements by the beneficiary in an otherwise complying draft are truthful, regardless of whether the letter of credit expressly requires veracity, for they already have the right under § 36-5-114(3) to reimbursement from the customer for honor of facially complying drafts. The possibility that the customer may be *unable* to pay is the risk the issuer assumed when it established the credit for its customer.

We conclude, therefore, that by warranting that "the necessary conditions of the credit have been complied with" under § 36-5-111(1), the beneficiary of a letter of credit only warrants that its draft complies with the terms of the letter of credit, and not that any statements it made to comply with the letter are truthful, unless truthfulness itself was a term of the letter of credit.

Returning to the case at hand, we find that this conclusion disposes of Republic National's defense to Amwest's claim for restitution. As mentioned, Republic National concedes that it *correctly* honored the initial draft for $160,000. Consequently, it does not dispute that Amwest complied with the terms of the letter of credit, and its assertion that Amwest violated its warranty must be rejected. Because Amwest did have a right to the $122,000 it sent to Republic National, the bank was unjustly enriched when it cashed the check, applied the proceeds to a liability to which it was exposed, and refused to return the money under the conditions Amwest indicated.

B

Even if we were to accept the contention that the beneficiary does warrant under § 36-5-111(1) that assertions it makes in compliance with the terms of the letter of credit are true, Republic National's assertion of a breach

of that warranty in this case is not an adequate defense to Amwest's equitable claim for restitution. Amwest's alleged breach is that, when submitting the first draft for $160,000, it had not, in fact, deemed any more than $38,000 necessary by reason of the bond it had issued for B & F Contractors. Republic National's view is that its payment of the facially complying draft for the full amount of the letter of credit discharged all of its obligations to Amwest and, when Amwest returned the amount in excess of that justified by Amwest's warranty, the bank had the right to dispose of the funds as it saw fit. We cannot accept this view because it grants Republic National a windfall.

The windfall is most easily recognized by considering the position Republic National would be in if Amwest had not erroneously demanded more than it deemed necessary—and Republic National has submitted no affidavit, deposition, or other rebuttal contradicting Amwest's affidavit and deposition testimony that it was merely an error. Without the error, Amwest would have submitted a draft identical to the one it sent, just for $38,000. Since this first draft concededly complied with the terms of the letter of credit, Republic National would have paid Amwest $38,000, and would have retained the remaining $122,000, leaving the bank obliged to honor future complying drafts up to $122,000. If Republic National's position is accepted, however, it may retain the $122,000 without the continuing obligation to honor future complying drafts up to that amount. The avoidance of this continuing obligation would constitute a windfall to the bank.

That Amwest's alleged breach of warranty under § 36-5-111(1) coincidentally resulted in discharge of Republic National's payment obligations under § 36-5-108(3)(a) does not alter the equities of this case. Had Republic National sued Amwest for breach of warranty by demanding more than was necessary to satisfy the B & F Contractors bond, rather than resort to self-help by put-

ting the excess returned by Amwest to uses other than those required by Amwest, the proper remedy would have been return of the excess funds to B & F Contractors, subject to a set-off to protect Amwest's ongoing rights under the letter of credit. For there is no indication in the Code that a breach of the beneficiary's warranty itself *extinguishes* the letter of credit, and Amwest's breach damaged the bank only to the extent that it paid *more* than it agreed to in extending the letter of credit. There is no reason to allow Republic National to benefit from Amwest's error by allowing it to avoid paying sums it *had* agreed to pay.

To avoid a windfall to Republic National, even if Amwest is considered to have breached its warranty when submitting the original draft for $160,000, Republic National's right to the $122,000 returned by Amwest must be recognized as conditional upon subsequent presentation of further drafts complying with the terms of the letter of credit, as Amwest indicated by requesting that the funds "be put back into the . . . Letter of Credit." Consequently, when the bank refused Amwest's facially complying draft of August 2, 1989, it converted the windfall and its acceptance of Amwest's returned money into unjust enrichment.

While the record is not adequate to conclude that Amwest's facially complying draft of August 2, 1989, for $122,000 did not also breach the warranty that Amwest in fact deemed the draft necessary, there is ample support in the form of affidavits by Amwest's investigating attorney in Georgia that Amwest thought its liability under the B & F Contractors bond exceeded the total value of the letter of credit within a few months thereafter.*

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* Repubic National's objection that the affidavit of Amwest's attorney about what Amwest knew and did must be disregarded because the statements made were not within his personal knowledge is wholly without merit. Not only did the sworn affidavit include a declaration that the facts contained therein "are known to Affiant personally and directly," but a supplemental affidavit explained

Amwest would be fully justified in deeming another draft for $122,000 necessary. Consequently no purpose, other than delay, would be served if a court sitting in equity now required Amwest to resubmit its draft for $122,000.

In summary, we conclude that Amwest did not breach its warranty as a beneficiary, so as to preclude restitution of funds it had given Republic National subject to the condition that Amwest have access to them as if under the letter of credit discharged by the initial complying draft. Even if Amwest were held to have breached its warranty, however, the coincidental discharge of the letter of credit notwithstanding, Republic National's resort to self-help in enforcing Amwest's warranty as a beneficiary resulted in the bank's unjust enrichment when it refused to honor Amwest's subsequent facially complying draft in accordance with the conditions under which Amwest returned the erroneous excess of $122,000 to the bank. Under the undisputed facts, therefore, Amwest deserved restitution of the $122,000 it gave Republic National, and summary judgment should have been granted for it, not Republic National.

V

There being no dispute about any material fact and Republic National being entitled to judgment on Amwest's claims of express and implied contract and of fraud, we affirm summary judgment on these claims. Because Amwest deserved restitution, however, we reverse summary judgment for Republic National on Amwest's claim of unjust enrichment, and we remand with the direction that the district court enter summary judgment for Amwest on this claim in the appropriate amount.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

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that he and another attorney in his firm were the only "field personnel" investigating the problems concerning the B & F Contractors bond and were the conduit for all of the information upon which Amwest acted.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 3:89-3079-0

AMWEST SURETY INSURANCE COMPANY,
Plaintiff,

-vs-

REPUBLIC NATIONAL BANK,
Defendant.

ORDER

[Filed Sep. 30, 1991]

This matter is before the Court on cross motions for summary judgment pursuant to Rule 56, F.R.Civ.P., both parties contending that, upon the facts established by the evidence and the applicable law, they are entitled to judgment. Upon consideration of the pleadings, affidavits and other evidence of record, together with the briefs submitted by the parties, the Court has determined that the defendant is entitled to prevail.

I.

It appears that in the spring of 1988 B&F Contractors, Inc. (B&F) submitted the successful bid to perform excavation work on a road construction project near Savannah, Georgia. Approval of B&F to perform the work was conditioned upon B&F's providing a payment and performance bond to the prime contractor, The

Hardaway Company. B&F requested the plaintiff Amwest Surety Company (Amwest) to issue the bond. Amwest agreed to issue the bond upon the condition *inter alia* that B&F provide collateral to Amwest in the form of a standby letter of credit (LOC) in the amount of $160,000.00, naming Amwest as beneficiary, thereby providing financial protection against Amwest's potential liability on the bond.[1] B&F caused the defendant, Republic National Bank (Republic) to issue a letter of credit in the amount required by Amwest. The letter of credit contains the following language:

> We hereby authorize you to draw on Republic National Bank of Columbia, South Carolina . . . by your drafts at site in the event you deem it necessary by reason of your having executed bonds on behalf of B&F Contractors, Inc.[2]

Upon B&F's compliance with all preconditions, including the providing of the letter of credit, Amwest issued the requested payment and performance bond, thereby enabling B&F to execute its subcontract with Hardaway and commence the work agreed upon. Thereafter, during March and April, 1989, B&F experienced difficulties which required Amwest to make payments of certain B&F obligations covered by the payment and performance bond in the sum of $38,000.00. Amwest decided to draw against the letter of credit issued by Republic and, on May 8, 1989, submitted a draft for $160,000.00 to Republic, together with the original letter of credit. Amwest had not determined that a draft in the full

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[1] A standby letter of credit insures that funds are available ("standing by") in the event of default of the underlying obligation. *See Airline Reporting v. First National Bank of Holly Hill*, 832 F.2d 823, 826-27 (4th Cir. 1987).

[2] The quoted language was drafted by Amwest and submitted to Republic for inclusion in the letter of credit; and it imposes as a condition precedent to a draw that Amwest make a determination that the amount of its draw is necessary.

amount of the letter of credit was necessary. Instead, Amwest had determined that a draft of $38,000.00 was needed to cover B&F's then known unpaid obligations. However, an Amwest employee submitted the draft to Republic for the full $160,000.00 because of a perception that a partial draw upon the letter of credit was not permitted. Nevertheless, the draft was honored by Republic and the $160,000.00 thereby became B&F's indebtedness to Republic.

When B&F discovered that a draw in the full amount of the letter of credit had been made, its representatives inquired of Amwest concerning the reason a draw in the full amount had been made. Thereupon, Amwest attempted, without success, to change the amount of the draw to $38,000.00.

On May 31, 1989 Amwest sent Republic a check for $122,000.00 and a letter stating that the money was to be "put back into" the letter of credit pursuant to a request by attorneys for B&F "to return the enclosed amount" to Republic.[3] Republic had been advised that the check would be coming and that it was to be applied to reduce the principal balance of the debt created by the letter of credit. Republic contends that this advice came from B&F representatives. Amwest contends that the statement came from a representative of First Sun South

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[3] Amwest's letter is as follows:

> You will find enclosed, check #66917 in the amount of $122,000.00 paid to the order of Republic National Bank to be put back into the aforementioned letter of credit.
>
> On May 10th we had called your bank that we were going to change our draft to a partial draw of $38,000.00 instead of the full amount of the Letter of Credit. A Lenore Steglich was supposed to call us back with instructions. What we received instead was your check for $160,000.00.
>
> Amwest Surety Insurance Company was requested by the attorneys for B&F Contractors, Inc. to return the enclosed amount since the claims against the bond have so far not exceeded the amount of $38,000.00.

Corporation, which signed B&F's promissory note to Republic as a guarantor. When Republic received Amwest's letter and $122,000.00 check, it applied the $122,000.00 to reduce B&F's indebtedness by the amount paid.[4]

Thereafter, Amwest attempted to persuade Republic to reestablish the letter of credit. Republic refused. Amwest then submitted a sight draft for $122,000.00 which Republic refused to honor. Amwest then commenced this action.

Several claims which were asserted in the complaint have been dismissed by order dated April 25, 1990. The complaint contains three remaining causes of action. Amwest's first cause of action alleges that by refusing to honor the $122,000.00 sight draft in August, 1989, Republic breached the terms of the letter of credit. The fourth cause of action asserts that by negotiating the $122,000.00 check in June, 1989, Republic impliedly contracted to reestablish the letter of credit. In its fifth cause of action, Amwest contends that Republic was unjustly enriched by the amount of $122,000.00 which it refused to return.

As stated above, both parties seek summary judgment. Amwest argues that it acted properly and within the scope of its rights in all of its dealings affecting the letter of credit; that it had every right to draw the entire amount of the letter of credit. Amwest also argues that when it forwarded its $122,000.00 check to Republic it viewed the delivery of its check to Republic as a continuation of the same transaction affecting the letter of credit and that by accepting Amwest's check without contesting the stated understanding pursuant to which the payment was made, Republic was obligated to reestablish the letter of credit.

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[4] When the letter of credit was issued, B&F signed a $160,000.00 promissory note which was guaranteed by First Sun South Corporation. Thereafter, when the letter of credit was fully drawn down, B&F's note became due and payable.

Republic argues that Amwest violated the terms of the letter of credit by submitting a draft for the full amount thereof without finding that a draft for the full amount was "necessary." Republic argues further that it fully performed its obligation under the letter of credit and that in the absence of some amendment to the original letter of credit, consented to by B&F, it was impossible for Republic to comply with Amwest's request to put the money back into the letter of credit. Republic also argues that it did not agree, either expressly or impliedly, to re-establish or replenish the letter of credit and that, moreover, under these facts, Republic has not been "unjustly enunciated."

II.

Amwest asserts that by accepting Amwest's $122,000.00 check in June, 1989 which was accompanied by its letter containing a request to replenish the letter of credit, Republic impliedly agreed to reestablish the letter of credit in the amount of $122,000.00; and that Republic's refusal to do so constitutes a breach of the alleged implied contract. Republic argues that, in the first place, the $122,000.00 was wrongfully obtained by Amwest in violation of the letter of credit which gave Amwest the right to draw upon the letter of credit only upon the determination that the draw was "necessary." Republic argues further that, since Amwest had only determined that it was necessary to draw $38,000.00, the remaining $122,000.00 was drawn in violation of the letter of credit.

Amwest argues that it had every right to draw upon the entire amount of the letter of credit on May 8, 1989 and that it did not violate the terms thereof. In its brief and at oral argument, Amwest argues that Republic impliedly contracted to reestablish the letter of credit.

Upon consideration, the Court concludes that Amwest cannot prevail on its claim that Republic impliedly agreed to reestablish the latter of credit. Amwest submitted

a draft to Republic for $160,000.00, the full amount set forth in the letter of credit. Amwest also returned to Republic the original letter of credit. As to the amount exceeding the $38,000.00 then determined as "necessary" to pay outstanding claims, Amwest breached the warranty created by S.C. Code Ann. § 36-5-111(1) which *inter alia* provides that:

> Unless otherwise agreed, the beneficiary by . . . presenting a documentary draft or demand for payment warrants to all interested parties that the necessary conditions of the credit have been complied with.[5]

Amwest's draft was honored by Republic, thus rendering B&F liable to Republic in accordance with the promissory note executed by B&F when the letter of credit was obtained. B&F notified Republic that the $122,000.00 check from Amwest should be applied to reduce B&F's obligation to Republic. Republic completely discharged its obligation to the parties when it honored Amwest's draft. *See* S.C. Code Ann. § 36-5-108(3)(a) (1976) (the issuer may honor complying drafts . . . in the order in which they are presented and is discharged *pro tanto* by honor of any such draft or demand). Reestablishing the letter of credit would have required a new agreement between Republic and B&F. *See* N. J. Rubenstein, *The Issuer's Rights and Obligations Under a Letter of Credit*, 17 UCC Law Journal 129, 131 (1984) (modification of letter of credit requires consent of all the parties); J. E. Byrne, *Letters of Credit*, THE BUSINESS LAWYER, 1353, 1370 (1988) (payment obligations cannot be changed without customer's consent). No such new agreement exists and there is no evidence that B&F has sought to modify the letter of credit.

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[5] *See Mellon Bank N.S. v. General Electric Credit Corp.*, 724 F.Supp. 360 (W.D. Pa. 1989), recognizing the right of the issuing bank to recover from the beneficiary monies paid pursuant to a draft submitted in violation of § 5-111(1) warranties.

Amwest's contentions that Republic has breached the terms of the letter of credit is not supported by the evidence. The opposite is true. Republic promptly honored Amwest's draft for $160,000.00, the full amount of the letter of credit.

Finally, Amwest's contention that Republic has been unjustly enriched by the amount of the $122,000.00 is without merit. Republic received the $122,000.00 sent by Amwest and properly applied it as a payment on the account of B&F in accordance with B&F's directions. Republic's retention of the $122,000.00 and application thereof to payment on B&F's outstanding account is not unjust. *Ellis v. Smith Grading & Paving*, 366 S.E. 2d 13 (S.C. App. 1988).

For the foregoing reasons, the judgment of the Court is that

(1) The plaintiff's motion for summary judgment is hereby denied.

(2) The defendant's motion for summary judgment is hereby granted.

IT IS SO ORDERED.

Columbia, South Carolina,
September 30, 1991.

/s/ Matthew J. Perry
MATTHEW J. PERRY
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-2713

AMWEST SURETY INSURANCE COMPANY,
Plaintiff-Appellant,
versus

REPUBLIC NATIONAL BANK,
Defendant-Appellee.

ORDER

[Filed Oct. 27, 1992]

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Niemeyer and Judge Legg

/s/ H. E. Widener, Jr.
For the Court

APPENDIX D

A. The Fifth Amendment, U.S. CONST. Amend. V, provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. Section 1 of the Fourteenth Amendment, U.S. CONST. Amend. XIV, Section 1, provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

C. Article 5 of the Uniform Commercial Code as adopted in South Carolina provides as follows:

S. C. Code Ann. § 36-5-108 (1977):

(3) If the credit is not a notation credit

(a) the issuer may honor complying drafts or demands for payment presented to it in the order in which they are presented and is discharged pro tanto by honor of any such draft or demand;

S. C. Code Ann. § 36-5-111(1) (1977):

Unless otherwise agreed the beneficiary by transferring or presenting a documentary draft or demand for payment warrants to all interested parties that the necessary conditions of the credit have been complied with. This is in addition to any warranties arising under Chapters 3, 4, 7 and 8.

S. C. Code Ann. § 36-5-114(2)(b):

(b) in all other cases as against its customer, an issuer acting in good faith may honor the draft or demand for payment despite notification from the customer of fraud, forgery or other defect not apparent on the face of the documents but a court of appropriate jurisdiction may enjoin such honor.

Supreme Court, U.S.
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No. 92-1228

In The
Supreme Court of the United States

October Term, 1992

REPUBLIC NATIONAL BANK,

Petitioner,

v.

AMWEST SURETY INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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Attorney for Respondent

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36 pp

QUESTION PRESENTED

1. Whether the Supreme Court of the United States should grant a writ of certiorari to review a decision of the United States Court of Appeals for the Fourth Circuit in a case brought originally under the federal district court's diversity jurisdiction (28 U.S.C. Section 1332), which determined no federal questions, was based solely upon the substantive law of South Carolina, and involved a commercial dispute of limited scope and impact.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Petitioner has correctly noted that the opinion of the United States Court of Appeals for the Fourth Circuit in this case involved questions of substantive law arising under the following statutes of the State of South Carolina: Sections 36-5-108(3)(a), 36-5-111(1), and 36-5-114(2)(b). The petitioner has also invoked the Fifth Amendment of the Constitution of the United States. However no federal questions were involved in the controversy decided by the court of appeals. Rather it is apparently Petitioner's contention that the effect of the court of appeal's decision was to deny Petitioner due process under the Fifth Amendment.

STATEMENT OF THE CASE

1. General Statement

This case involved a series of transactions affecting a letter of credit issued by the petitioner under South Carolina law. The letter of credit had been issued for the benefit of Respondent, to protect Respondent from losses which might arise as a result of Respondent's having issued a surety bond naming Petitioner's customer as the principal obligor. In the course of these transactions, Respondent delivered a payment to Petitioner in the amount of $122,000.00, with instructions that the funds be "put back into" the letter of credit. Instead, Petitioner retained the funds. The

net effect of the transactions between Petitioner and Respondent was that Respondent received the benefit of only $38,000.00 in funds which were traceable to the $160,000.00 letter of credit, despite Respondent's having suffered much greater claims against the surety bond. Respondent brought this action against Petitioner under various theories arising under South Carolina law to recover the amount of the payment made by Petitioner to Respondent.

2. Supplement and Response to Petitioner's Statement of Facts

Respondent Amwest Surety Insurance Company (Amwest) was unaware of the existence of a promissory note executed by Amwest's principal B&F Contractors, Inc. (B&F) to Petitioner Republic National Bank (Republic).[1] As a legal matter Amwest was not concerned with Republic's relationship with its customer (which may in fact have been a party other than B&F) with respect to the letter of credit.

Amwest did not act improperly or make any false warranty when it initially submitted a draft for $160,000.00 against the letter of credit. However,

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[1]Respondent Amwest Surety Insurance Company is a subsidiary of Amwest Insurance Group, Inc., which is also the parent of Far West Insurance Company. The shares of all three companies are publicly traded. The parties are accurately named in the style of the petition.

Amwest's election to draw the entire amount of the letter of credit was based in part upon a mistaken belief by one of Amwest's employees that partial draws against the letter of credit were not permitted. When that notion was corrected -- which was almost immediately upon submitting the initial draft -- Amwest promptly attempted to rescind the initial draft, seeking in effect to convert the full draw into a partial one by delivering a check for the difference to Republic with directions that the funds be "put back into" the letter of credit. Apparently on the direction of a third party who was a guarantor of B&F's obligation to Republic, Republic retained the funds delivered by Amwest and refused to re-institute the letter of credit. (Pet. App. 4a-5a.)

SUMMARY OF THE ARGUMENT

The court of appeals injected no new issues into this case in its opinion. The court of appeals' discussion of a "windfall" plainly involved nothing more than the use by the court of a particular term in its discussion of the equities involved in Amwest's claim for restitution. Further, even if the court of appeals' discussion of the statutory warranty pertaining to letters of credit had introduced new matter to the case, Republic had ample opportunity to address that discussion -- and Republic did address it -- in its petition for a rehearing by the court of appeals. Republic's petition for rehearing did not, however,

suggest that Republic had been denied any desired opportunity to introduce additional factual evidence at trial, and no such need is specified (rather than simply alluded to) in Republic's petition for certiorari. Accordingly, Republic has suffered no deprivation of due process. Helis v. Ward, 308 U.S. 365 (1939). Finally, the court of appeals' discussion in its opinion of the statutory warranty pertaining to letters of credit is little more than dicta due to the court's alternative holding that restitution would be awarded Amwest irrespective of any breach of the warranty, and accordingly the decision will have little influence beyond what is due it on the strength of the reasoning that was presented by the court.

ARGUMENT

Republic contends in its petition that it never had the opportunity in this case to argue the issue of whether "Amwest had not warranted the truth of its draw request," or the issue of whether the transactions between Amwest and Republic resulted in a "windfall" to Republic. (Pet. 6.) Yet, the primary issues addressed by both the district court on summary judgment and the court of appeals in the appeal from summary judgment were whether the critical payment by Amwest to Republic had caused Republic to be unjustly enriched so as to support a claim for restitution, whether Amwest had breached a statutory warranty (under S.C. Code Ann. Section 36-5-111(1)

(1977)), and if so, whether such a breach would preclude Amwest from recovering. These are essentially the same matters of which Petitioner now complains.

From the first pleading in this litigation, Amwest has consistently argued that the effect of Amwest's payment to Republic, in the context of the various transactions relating to the letter of credit, was to unjustly enrich Republic. Republic opposed Amwest's position, arguing in its motion for summary judgment--as it continues to do now in its petition for review by this court -- that Amwest breached a statutory warranty pertaining to drafts against a letter of credit, and that therefore Amwest did not "own" the funds which Amwest delivered to Republic, and that therefore Republic could not have been unjustly enriched by retaining those funds. Republic's argument was accepted by the district court in its order on summary judgment. Republic's argument was rejected by the court of appeals, which found that Amwest should recover its payment to Republic regardless of whether Amwest had breached the statutory warranty.

The court of appeals' conclusion that Amwest should recover from Republic was based upon sound principles of the law of restitution, referred to as such in the court of appeals' opinion. Amwest's claim for restitution was based upon principles of South Carolina common law which recognizes an action for the recovery of money which, "in equity and good

conscience belongs to [the plaintiff]...." McDonald's Corporation v. Moore, 237 F.Supp. 874, 877 (W.D. S.C. 1965); and see, also, U.S. Rubber Products v. Town of Batesburg, 183 S.C. 49, 190 S.E. 120 (1936), and Am.Jur. 2d Restitution, at Section 3 (1985). In conducting its analysis of Amwest's claim, the court of appeals quite appropriately considered the overall effect of the transactions between Amwest and Republic, which the court correctly concluded had resulted in an inequitable advantage to Republic and an unfair detriment to Amwest. The court of appeals referred to this advantage and corresponding detriment as a "windfall."

Republic now claims that the use of this innocuous and generic term means that the court of appeals' decision was based upon an entirely new theory or "doctrine" not previously addressed in these proceedings. (Pet. 5.) It was not. There simply is no "doctrine of windfall" existing independently of the legal and equitable principles which have always been at issue in this case. A windfall, according to a popular general dictionary, is "an unexpected or sudden gain or advantage." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (Merriam-Webster, 1986, second entry). A correspondingly popular law dictionary does not even carry an entry for the term (though "windfall profits tax" is defined, courtesy of the

1980 Arab oil embargo). BLACK'S LAW DICTIONARY (6th ed. 1990); Cf. Slaughter v. Levine, 801 F.2d 288, 302 (8th Cir. 1986) (granting the equitable remedy of injunction, under general equitable principles, to prevent recoupment by the state of welfare overpayments which the state characterized as a "windfall" to the recipient). In the present case, the court of appeals' use of the word "windfall" to characterize the effect of Amwest's payment to Republic simply did not inject any new issue, legal, equitable or factual, into the proceedings.

Perhaps more importantly, the petitioner's premise that the court of appeals decided this case on a different theory from that considered by the district court, even if it were true, would not require that the petitioner be granted additional review or that the case be remanded for new proceedings. In Helis v. Ward, 308 U.S. 365, 369 (1939), the trial court had applied its interpretation of the contract at issue to evidence which was admitted without objection at trial in arriving at a judgment. On appeal, the circuit court of appeals first arrived at a different interpretation of the contract, then applied its new interpretation to the same evidence which had been considered at trial, and finally reversed the trial court. The aggrieved litigant, relying on Saunders v. Shaw, 244 U.S. 317 (1917), sought review by the Supreme Court on the grounds that he had been deprived of due process as a result

of the court of appeals having decided the merits of the case on a theory which had not been presented at trial. Helis, at 369. The Supreme Court rejected the petitioner's theory and affirmed the decision of the court of appeals.

In its decision in Helis, the Supreme Court held that an appellate court's adoption of a new theory during the appeal of a case does not per se violate the losing party's due process rights. The Supreme Court then observed that the petitioner in that case had not sought a new trial or otherwise shown that he could prove additional facts going to the merits of the case, in either his petition for rehearing by the court of appeals or in his petition for certiorari. Helis, at 369-370 and n.2. Accordingly, the Supreme Court concluded, the court of appeals' decision had not denied to the petitioner any right which had not been waived.

The issues presented in Republic's Petition are controlled by the Supreme Court's holding in Helis. As in Helis, the petition which Republic made for rehearing by the court of appeals (which is set forth in its entirety in the appendix to this brief), sought no opportunity to present additional evidence, but contained instead a lengthy and detailed argument against the legal theories presented by the court of appeals in its opinion (as construed by Republic). Indeed, since moving for summary judgment in the district court, Republic has not significantly departed

from its position that the relevant facts in this case are not disputed and are in the record. The relief ultimately sought in Republic's petition for a rehearing by the court of appeals was not a new trial, but a rehearing in which Republic could "challenge [the appellate panel's] reasoning," which Republic characterized as having "infirmities." (Resp.App. 18(a).) Of course, Republic had already challenged the appellate panel's reasoning in the body of the petition for rehearing, a challenge which the court of appeals duly considered and denied.

In its Petition for Certiorari, Petitioner pays lip service to the notion that the court of appeals, in its opinion in this case, decided novel factual issues in addition to introducing what Republic characterizes as new legal theories. (Petition, 6, 8.) However Petitioner suggests no facts which it might expect to prove at a new trial pertaining to such issues, and more importantly, Petitioner fails to explain how the factual proofs relevant to deciding whether "the retention of the disputed funds by Republic under all of the facts of this case would have been so inequitable as to amount to a windfall" (Pet. 6), might differ from the factual proofs relevant to whether Republic had received a payment of money which, in equity and good conscience, belonged to Amwest. Moreover, in practically the same breath with which it invokes the bare possibility of making new factual proofs, Petitioner urges the Supreme Court to issue a

summary reversal of the court of appeals' decision, and that prayer is repeated in the conclusion of Republic's Petition. (Pet. 8, 14.) Thus, Republic's petition for rehearing to the court of appeals, without exception, and Republic's Petition for Certiorari, in substance, demonstrate clearly that Republic's only argument in this case is that the court of appeals erred in applying the substantive law of the state of South Carolina.

Finally, the decision of the court of appeals in this case will have little impact beyond the actual determination of Amwest's claim against Republic. While the court of appeals' discussion of the statutory warranty pertaining to letters of credit is an interesting contribution to a very small body of jurisprudence, it carries no real weight. Not only does the analysis suffer from being the expression of a federal court sitting in diversity, but, because of the court's alternative holding, the discussion of the warranty statute is ultimately rendered little more than dicta. That the court of appeals' opinion contains such an extended discussion at all is little more than a testimonial to Republic's insistence on shifting the emphasis in this case away from an analysis of the payment which Amwest filed this action to recover. Republic has insisted that if it could show that Amwest breached the statutory warranty, then Amwest could not claim that it owned (and hence, was entitled to control) the funds which Amwest delivered to Republic. Republic still insists on this proposition

(Pet. 12 n.7), but still has not supported it, and the court of appeals properly rejected it. The court of appeals' discussion of the statutory warranty thus is pertinent, but not that important, and in any event presents no grounds for review.

CONCLUSION

This case involves no conflict between one United States court of appeals and another; this case involves no decision by any court of any federal question (let alone one of great importance); and this case involves no departure by the lower court from the usual course of judicial proceedings. (See, generally, Rule 10.1, Rules of the Supreme Court of the United States.) Instead, this petition involves a litigant who is unhappy with a decision by the court of appeals concerning issues of substantive state law, a decision which was rendered only after the issues were extensively briefed and argued to, and considered by, the court of appeals. Moreover the decision of the court of appeals in this case concerns such a peculiar situation, and such a limited issue of law, that it is unlikely ever to have much impact beyond the parties to the present litigation.

This case is not an appropriate case for review on a writ of certiorari, and the petition should be denied.

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Case No. 91-2713

AMWEST SURETY INSURANCE COMPANY,

Appellant,

v.

REPUBLIC NATIONAL BANK,

Appellee.

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING IN BANC

On Appeal from the United States District Court
for the District of South Carolina, Columbia Division

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Statement of Facts

Republic issued a $160,000.00 stand-by letter of credit to Amwest as security for the obligations of the account debtor, B & F Contractors, Inc., under payment and performance bonds issued by Amwest in connection with B & F's performance of a construction contract. One of the conditions of the letter of credit was that Amwest consider its draw necessary by reason of having issued the bonds, which in effect meant that draws could not exceed the amounts of claims made against the bond. Amwest's first draw request was for the full $160,000.00 although claims made totalled only $38,000.00. Amwest made no determination that a draw in the full amount was necessary. When B & F discovered the draw, it complained to Amwest, which then attempted to change its draw to $38,000.00. Amwest requested the change too late, however, because Republic had immediately honored the initial draw request for $160,000.00, not knowing that Amwest had violated the conditions of the letter of credit. By honoring the draw request, Republic was discharged from further liability on the letter of credit.

Amwest then sent Republic a check for $122,000.00 (the difference between $160,000.00 and $38,000.00) requesting that Republic "put it back into" the letter of credit. Republic declined and instead applied the $122,000.00 to the $160,000.00 indebtedness of B & F which was created when the letter was wrongfully drawn down by Amwest. Amwest then demanded that the $122,000.00 be returned to it, and Republic refused. Amwest thereafter submitted a $122,000,00 draw request which Republic declined to honor on the ground that the

letter of credit was discharged. Amwest made no determination that a draw of $122,000.00 was necessary. Upon dishonor of the last draw, Amwest brought suit to recover the $122,000.00.

Course of Proceedings and Disposition

Amwest filed its Complaint on September 29, 1989, seeking to recover the $122,000.00 which it had returned to Republic. Recovery was sought on the theories of breach of implied contract, breach of express contract, fraud, bad faith and unjust enrichment. The district court dismissed the fraud and bad faith claims by order dated April 23, 1990. Thereafter the parties submitted cross-motions for summary judgment on the remaining claims. By order dated September 30, 1991, the Court granted summary judgment to Republic on all remaining counts and denied Amwest's motion. Final judgment was entered on the Order on October 2, 1991. Amwest appealed from the orders dismissing its fraud claim, granting summary judgment to Republic and denying summary judgment to Amwest. On October 1, 1992, the panel affirmed so much of the district court's orders as granted dismissal of the fraud claims and granted summary judgment in favor of Republic on the express and implied contract claims. However, the panel reversed the district court's grant of summary judgment to Republic on the unjust enrichment claim and the denial of summary judgment in favor of Amwest on that claim, and directed the district court to enter summary judgment in favor of Amwest for restitution in the amount of $122,000.00.

Introduction and Statement of Purpose

Republic hereby petitions the Court to rehear this appeal and suggests that rehearing be conducted *en banc*. In the judgment of counsel for Republic, the Court's decision should be reviewed because:

A. The panel reversed the district court upon legal and factual grounds and theories which were not presented by Amwest to the district court and which were not briefed by Amwest before this court, with the result that the panel's decision violates Republic's rights to procedural due process of law as guaranteed by the Fifth Amendment to the United States Constitution. (Page 15 *infra*).

B. In holding that Amwest did not breach the §5-111 warranties of the Uniform Commercial Code, the Court's decision overlooks the fact that a necessary condition to the letter of credit was that the amount of the draw *in fact* equal the amounts of claims actually paid under the bond, and not simply that Amwest represent such equality to exist. (Page 8 *infra*).

C. The Court's decision overlooks the fact that its holding that fraudulent statements made by the beneficiary in satisfaction of the conditions of the letter of credit do not violate §5-111 warranties unless the veracity of those statements has itself been independently warranted in the letter of credit is directly contradicted by other authorities which the Court has overlooked. (Pages 6 to 10 *infra*).

D. The Court's decision overlooks the fact that Republic's position does not involve a dispute on the underlying contract between

Amwest and the account debtor as to the amount actually due between them, but instead involves only the issue under the letter of credit as to whether the amount of the draw exceeded claims actually paid under the bond. (Pages 10 to 12 *infra*).

E. The Court's opinion overlooks relevant authorities which uphold the entitlement of the issuer to the proceeds of a letter of credit when there has been a breach by the beneficiary of the rule 5-111 warranty. (Pages 12 to 14 *infra*).

Grounds for Rehearing En Banc

Republic respectfully suggests that this appeal should be reheard *en banc* because the panel's opinion establishes new standards and establishes new remedies which very probably will have profound effects upon the availability and performance of letters of credit as facilitators of interstate commerce. It matters not that the Court's opinion decides only matters of South Carolina state law. Virtually all issues relating to letters of credit are state law issues. A reading of letter of credit cases reflects, however, that state and federal courts draw freely upon cases from other jurisdictions due to the uniformity of the statutory frameworks involved. That the ramifications of published opinions such as this one can be expected to have far-reaching consequences has been eloquently noted by one federal appellate judge as follows:

> Though the instant case is a diversity case and "writing in diversity we write on the wind," *Thompson v. Johns-Manville Sales Corp.*, 714 F.2d

> 581 at 583 (5th Cir. 1983) (Gee, J.), the precedential force of the majority opinion is likely to be great considering the field of law and the status of the author. It stresses me to think that the once useful device of letters of credit may be a less reliable device now.

Philadelphia Gear Corp. v. Central Bank, 717 F.2d 230, 242 (5th Cir. 1983) (Goldberg, J., dissenting).

Argument and Citation of Authority

In the sections which follow, Republic will set forth the factual and legal shortcomings in the panel's reasoning which support rehearing. Thereafter, Republic will demonstrate that the grounds relied upon were raised for the first time in the panel's opinion and therefore constitute improper bases upon which to reverse the lower court.

I. THE APPLICABILITY AND EFFECT OF THE §5-111 WARRANTIES

The warranty which is provided in §5-111(1) of the Uniform Commercial Code (codified in South Carolina at S.C. Code Ann. §36-5-111(1) (1977)) provides that in presenting a draft a beneficiary warrants "that the necessary conditions to the credit have been complied with." Republic's position at trial and on appeal is that by submitting a draft which exceeded the amount of claims made, Amwest violated one of the necessary conditions of the credit, thereby breaching its warranty that it had satisfied that condition. And since the South Carolina Reporter's Comments to §5-111(1) specifically confirm

"the right of an issuer to recover any payment made to a beneficiary when the conditions of the credit have not been complied with . . . ," Republic takes the position that it, and not Amwest, was entitled to the $122,000.00.

The panel rejected this reasoning on two grounds. First, it recognized a purported split in authority as to whether a beneficiary, in addition to making statements required by the conditions of the letter of credit, also warrants that those statements are true. Finding that there is no warranty of veracity unless expressly set forth in the letter of credit, the panel concluded that Amwest had not violated the §5-111 warranty even though its statements may have been false. As Republic will explain, the panel's decision on this basis establishes a new standard under letter of credit law and conflicts with all other cases to consider the issue.

Second, the panel rejected Republic's warranty argument on the ground that to allow Republic to retain the disputed funds would violate the independence principle, which states that it is improper to determine the obligations of the issuer through reference to performance of the underlying contract between the beneficiary and the account debtor. The Court found the independence principle to be applicable upon the erroneous conclusion that "allowing the issuer to recover funds paid on a draft because of falsity of such assertions amounts to allowing the issuer to recover for non-performance of the underlying contract." Republic will show below that any representation at issue here has nothing to do with the underlying contract but only with respect to the amount of claims paid, with the result that the independence principle is irrelevant.

A. Separate Warranty of Veracity Is Not a Requirement of §5-111(1).

The panel's decision is based primarily on what it perceives to be a split of authorities as to whether or not the beneficiary warrants the truth of statements made by it in order to satisfy the conditions of the letter of credit. Slip Op. at 10. The panel opted to adopt the alleged view that there is no such warranty of veracity unless it appears in writing in the letter of credit.

This ruling, in effect, immunizes fraud by assuring beneficiaries that they have nothing to lose by misrepresenting their performance of conditions or by negligently performing their obligations under the letter of credit. It ignores the fact that any party who is entitled to the protection of §5-111 warranties, to include the account debtor as well as the issuer, is stripped of much of that protection. The account debtor has virtually no other protection under Article 5, and is now relegated to total reliance upon its rights, if any, under the underlying contract. The beneficiary is now free to receive the benefits of early or wrongful collection of sums due, even though such wrongful acquisition of the proceeds of the letter of credit may have harmed the account debtor and even though the beneficiary may have had no contractual right to the proceeds at the time they were obtained.

The panel's holding also endangers important interests of the issuer. In agreeing to issue a letter of credit, an issuer accepts only the risk that the account debtor will default thereby necessitating a draw against the letter of credit. The panel's apparent conclusion that the issuer also knowingly accepts the risks which result when the

beneficiary abuses its rights or neglects its obligations under a letter of credit is certainly contrary to commercial practice, and will doubtlessly make issuers more reluctant to issue letters of credit in the future. Other courts have recognized a strong public interest in preventing deception in connection with letter of credit transactions. *E.g. Universal Marine Insurance Co. v. Beacon Insurance Co.*, 581 F.Supp. 1131, 1139 (W.D.N.C. 1984); *Larson v. First Interstate Bank of Arizona*, 603 F.Supp. 467, 470 (D.Ariz. 1983). The panel's opinion clearly violates that interest.

The panel's decision suffers as well because it is based upon an apparent misunderstanding of the facts. It chooses to view this case for some reason as involving only a *misrepresentation* by Amwest that it deemed the draw necessary. It fails to recognize, however, that Republic claims that it was an actual *condition* of the letter of credit that the draw not exceed claims actually made against the bond. Appellee's Brief at 30-32. This condition was unquestionably not fulfilled by a draw which exceeded claims made by $122,000.00. If such a condition did not in fact exist, the warranty was indisputably broken, whether or not representations were made. Thus, a warranty of veracity is not necessary to a finding of breach of the §5-111 warranties.

Not only is the panel's decision factually infirm, the cases relied upon do not offer strong support for its decision. The intermediate appellate decision in *Delta Brands, Inc. v. MBank Dallas, N.A.*, 719 S.W. 2d 355 (Tx. Ct. App. 1986) does not in any manner limit the warranties available under §5-111. It simply confirms that the beneficiary warrants that documents are facially complying *and* that there are no conditions excusing payment under

§5-114(b). *Id.* at 359. The conditions set forth in §5-114(b) specifically include fraud. The *Delta Brands* court was not confronted with the issue of whether a beneficiary warrants the truth of statements made, and therefore never specifically held, directly or indirectly, that no such warranty exists under §5-111(1). The only other case relied upon by the panel similarly was not confronted with the issue and, therefore, did not conclude that a beneficiary did not warrant the truth of its statements. *See Philadelphia Gear Corp. v. Central Bank*, 717 F.2d 230, 236 (5th Cir. 1983).

It is important to note, however, that in another decision discussed by the panel, Texas' highest court did not interpret the *Delta Brands* decision as does the panel. Indeed, the Texas Supreme Court concluded that, to the contrary:

> All authorities which have addressed the issue agree that under section 5.111(a) a beneficiary warrants that all statements made in documents presented to obtain payment are true. *See Barclay Int'l v. First Alabama Bank*, 557 So.2d 1201, 1206 (Ala. 1989); *Brown v. United States Nat'l Bank*, 220 Neb. 684, 371 N.W.2d 692, 701 (1985); *Pubali Bank v. City Nat'l Bank*, 676 F.2d 1326, 1328-29 (9th Cir. 1982), opinion following remand, 777 F.2d 1340 (9th Cir. 1985); *Mellon Bank v. General Elec. Credit Corp.* 724 F.Supp. 360, 363 (W.D.Pa. 1989); [L.] WEERAMANTRY [& W. SCHLICHTING, IX BANKING LAW] §234.08, at 234-54 to 234-55 [1990]; Dolan, [*Letters of Credit, Article 5 Warranties, Fraud, and the Beneficiary's Certificate*, 41 BUS. LAW. 347,] AT 349 [(1986)]."

Sun Marine Terminals v. Artos Bank & Trust, 797 S.W.2d 7, 11 (Tex. 1990). The foregoing passage was obviously overlooked by the panel.

The panel's decision stands alone as apparently the only reported decision in which it has been held that a beneficiary does *not* warrant the truth of statements made in order to obtain payment under a letter of credit. Because of the far-reaching implications which that holding has for all parties to a letter of credit transaction and because of the less-than-compelling authority upon which it is based, it should be re-examined by the Court *en banc*.

B. The Independence Principle

As mentioned above, the independence principle provides only that an issuer is not free to refuse to honor a conforming draft based upon underlying *contract* disputes between the beneficiary and the account debtor. In the context of this case, it means that Republic would not have been free to refuse to honor Amwest's draft simply because B & F disputed the validity of some of the claims made against the bond. In its opinion the panel attempts to implicate the independence principle by arguing:

> Since *most* assertions of fact required by letters of credit concern performance of the underlying contract between the beneficiary and the customer, allowing the issuer to recover funds paid on a draft because of the falsity of such assertions amounts to allowing the issuer to recover because of non-performance of the underlying contract.

Slip Op. at 11 (emphasis added). Whatever validity as an abstract legal principle this rule may have, it is simply inapplicable in this case.

First, if the court focuses on compliance with *the condition* that the draw not exceed claims made, the rule announced by the panel does not apply because it is addressed to statements and not to conditions. Second, the statement at issue here does not relate to the performance of the underlying contract. The statement warranted was that Amwest deemed the draw to be necessary and, thus, that the draw did not exceed claims made. Whether Amwest "deemed" the draw to be necessary deals strictly with the issue of whether or not Amwest made a determination of necessity and not with whether that determination was in fact justified under the terms of its contract with B&F. Similarly, the performance issues *under the contract* between Amwest and B & F are with respect to whether the claims are valid and deserving of payment under the bond. The *number* of claims made, however, is a fact over which the parties have no control, and the relationship of the size of the draw and the number of claims is strictly an issue of performance under the terms of the letter of credit. As one Court has recognized, "Because [the issuing bank] is suing on the warranties made by the beneficiaries, it is suing on the letters themselves and not on the underlying contract . . . . " *Pubali Bank v. City Nat. Bank*, 777 F.2d 1340, 1343 (9th Cir. 1985).

That the independence principle should not prevent recovery by Republic in this case is also dictated by public policy. As courts have recognized in the past, the

policies underlying the independence principle are outweighed by a stronger public interest in preventing fraud. *Universal Marine Ins. Co.*, 581 F.Supp. at 1139; *Larson*, 603 F.Supp. at 470.

Based upon the foregoing, Republic submits that the independence principle does not provide a sufficient justification for the dramatic rule changes announced in the panel's opinion.

II. REPUBLIC'S RETENTION OF THE DISPUTED FUNDS IS NOT UNJUST.

The panel's opinion, as noted above, begins with the observation that in order for there to have been unjust enrichment, Amwest must have been the owner of the funds at the time Republic gained possession. The sole basis upon which the panel purported to find a right in Amwest to ownership of the funds was its finding that Amwest did not breach its §5-111 warranty. This latter finding was obviously necessitated by the fact that had a breach of warranty been found, the UCC clearly entitles the issuer to possession of the wrongly obtained funds. *See* South Carolina Reporter's Comment to §5-111(1).

The panel held alternatively that even if there had been a breach of warranty, Amwest would be entitled to the funds in order to prevent Republic from receiving a "windfall." This alternative holding overlooks the fact that once a breach of warranty is assumed, the sole basis available to the panel for concluding that the funds belong to Amwest no longer exists. Because a party is entitled to restitution only with respect to property which

belonged to it in the first instance, the "windfall" rationale cannot support restitutionary recovery.

Beyond this logical infirmity in the "windfall" rationale, there is a more important policy reason for rejecting it. In order to find a "windfall," the panel placed itself in the position of having to weigh the equities between issuer and beneficiary, thereby creating precisely the type of uncertainty which letters of credit and related legislation are designed to avoid. As noted by Judge Goldberg, "The terms of letters of credit and applicable laws choreograph an elaborate dance. So long as the steps are followed, payment also follows." *Philadelphia Gear,* 717 F.2d at 241 (dissenting opinion). This elaborate dance requires strict compliance with the terms of the credit. As one commentator explains:

> Properly understood, the rule of strict compliance is vital to the health of the credit. Credits require precision and it is dangerous for courts, unguided by the dictates of commerce, to pick and choose what should be given effect and what should not. When a bank issues a credit, it undertakes a specified risk and no other, and that should be the legal character of its undertaking.

J.E. Byrne, *Letters of Credit,* 43 THE BUSINESS LAWYER 1353, 1359 (1988).

The cases show that once a breach of warranty has been established, the adverse consequences of the breach fall upon the beneficiary. For example, in *Delta Brands,* a case heavily relied upon by the panel, the court held the bank entitled to recover back from the beneficiary the proceeds of the letter of credit due to a mere technical language failure in the draft and even though payment was due the beneficiary for goods sold and delivered. 719

S.W.2d at 359. As between the bank and the beneficiary, it was left to the beneficiary to recover from the account debtor. In this case, Amwest's failure (whether fraud or negligence) is, if anything, more culpable and, thus, less deserving of judicial assistance. Republic has found no cases holding the beneficiary to be entitled to the proceeds of a letter of credit notwithstanding a breach of §5-111 warranties, and the panel's opinion cites none.

Finally, Republic would point out that this is simply not a case of enrichment or windfall.[1] The panel overlooks the fact that Republic's and Amwest's respective positions were the same in the sense that they were both seeking repayment as creditors of B&F. Amwest's breach of warranty merely requires that it, and not Republic, must face the uncertainties of recovery directly against B&F and its guarantors, as opposed to the certainty of payment out of the proceeds of the letter of credit. That is the way it should be, given Amwest's failure to exercise care in this transaction.

III. THE PANEL RELIED UPON IMPROPER GROUNDS.

The panel's decision is premised upon three grounds: (1) that Amwest did not warrant the veracity of its statements, (2) that permitting Republic to retain the funds would conflict with the independence principle, and (3)

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[1] The panel's decision also overlooks the fact that on analogous facts the South Carolina Court of Appeals has held that no unjust enrichment had occured. *Ellis v. Smith Grading & Paving, Inc.*, 366 S.E.2d 12, 15 (S.C.App. 1988).

that judgment in favor of Amwest was authorized, even in the presence of a breach of warranty, in order to prevent Republic from receiving a "windfall." Because none of those grounds was raised by Amwest at trial or on appeal, the panel's published order constitutes the first notice to Republic that said grounds, if not waived, are even part of this case. Having had no adequate opportunity to address the panel's grounds for decision, Republic respectfully submits that in the event rehearing is not granted, it will suffer a denial of procedural due process of law as guaranteed by the Fifth Amendment to the United States Constitution. *See Bass v. Bass*, 249 S.E.2d 905 (S.C. 1978); *Mayhill Homes v. Family Fed. Sav. & Loan*, 324 S.E.2d 340 (S.C.App. 1984).

Conclusion

In summary, Republic believes that the questions decided by the panel are of potentially immense commercial importance. Because of that fact, because of the above infirmities in the panel's reasoning, and because fundamental fairness dictates that Republic have a full and adequate opportunity to challenge that reasoning, Republic respectfully requests a rehearing and suggests that rehearing be conducted *en banc*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that due and proper service of the document affixed hereto and described below was made by depositing two copies of same in the United States Mail at Columbia, South Carolina, in an envelope with adequate first-class postage duly affixed and return address clearly indicated thereon and addressed to:

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Description of Document:

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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No. 92-1228

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

REPUBLIC NATIONAL BANK,
Petitioner,

v.

AMWEST SURETY INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent proposes four grounds for denying Republic's petition. First, it argues without supporting authority or reason that denial by the court of appeals of Republic's Petition for Rehearing constitutes a sufficient proceeding to satisfy due process requirements. Amwest's position, however, ignores the nature and purposes of proceedings under FRAP 40. Amwest contends next that in any event, no rehearing was required because the Fourth Circuit did not inject new issues into the case. Amwest does not attempt to show that the windfall and warranty of veracity grounds were raised earlier in this case. Instead, it merely argues that the court of appeals' use of the word "windfall" was supposedly no more than a new description of the process of decision typically implicated by an unjust enrichment claim. Even if Amwest's attempted characterization is accurate (which it is not), it ignores the fact that the availability of the windfall rationale depends upon whether the court of

appeals correctly resolved the warranty issues, which issues unquestionably were new to this case. Third, Amwest incorrectly claims that Republic could not be deprived of due process in the absence of a request for a new trial or of proof of new facts going to the merits. Finally, without authority or reasoning of its own and without responding to the authority and commentators cited by Republic, Amwest incorrectly and illogically concludes that the Fourth Circuit's opinion is unlikely to have any effect beyond the immediate parties.

1. Amwest claims that *denial* of a petition for rehearing somehow equates to the type of full re-consideration which would have been provided if rehearing had been granted. This argument should be rejected out of hand given that failure of a petition to achieve necessary votes for rehearing does *not* imply any judgment on the merits and has no jurisprudential significance. *In re Grand Jury Investigation*, 542 F.2d 166, 173 (3d Cir. 1976), *cert. den.*, 429 U.S. 1047 (1977). Because the Fourth Circuit, by denying rehearing, refused to review the merits of Republic's position on issues which were raised for the first time in the court's opinion, Republic has been denied the due process of law to which it is entitled under *Saunders v. Shaw*, 244 U.S. 317 (1917).

2. Amwest's unpersuasive attempt to convince the Court that the decision below did not inject new issues into this case conveniently mischaracterizes the effect of that decision and purposely ignores the primary ground upon which it was based. Indeed, Amwest never denies (and therefore implicitly concedes) that the purported warranty of veracity and the "windfall" concept had never been mentioned prior to the court of appeals' opinion. The primary ground for the Fourth Circuit's decision was its imposition of the requirement of a separate warranty of varacity under § 5-111(1), and the issues raised by this ground unquestionably appeared for the first time in the Fourth Circuit's opinion.

Moreover, those issues cannot be separated from the court of appeals' use of the "windfall" rationale. If the Fourth Circuit erred in requiring a separate warranty of veracity, avoidance of a windfall to Republic could not legally constitute a relevant consideration. As the Fourth Circuit itself recognized, unjust enrichment requires a finding that the enriched party has obtained "the property or proceeds *of another*, without a right to do so. . . ." Pet. App. 10a (emphasis added), *quoting*, *Harper v. McCoy*, 276 S.E.2d 782, 783-84 (S.C. 1981). The court of appeals also recognized that if a beneficiary obtains the proceeds of a letter of credit by submitting a draft when all conditions of the credit have not been satisfied, it violates the § 5-111 warranty and does not become the owner of the wrongly obtained funds. Pet. App. at 12a. In such a case, under § 5-111 the funds go to the issuer.

By concluding that even if there had been a breach of warranty, the funds should go to Amwest in order to avoid a windfall to Republic, the Fourth Circuit reached a result which cannot be supported in law or in equity. Recognition of Republic's right to the funds is the result which is compelled by proper application of § 5-111 and traditional letter of credit law. The Fourth Circuit's reliance upon broad equitable principles in order to circumvent that right was clearly improper. Indeed, use of equitable powers is limited by the rule that

> [e]quitable principles . . . cannot be applied . . . to subvert established rules of law . . . . While maxims of equity may be involved to protect an existing right, they are not available to create a right where none exists.

27 Am.Jur. 2d, *Equity* § 118 at 645 (1966). Thus, if Amwest obtained the disputed funds in violation of its § 5-111 warranties, it had no right to those funds, and equity cannot properly be employed to create such a right.

The windfall rationale raises serious issues, even apart from the warranty questions. A serious concern of

those engaged in commerce and banking is whether the type of case-by-case decision-making which is required by the windfall rationale can or should have any application in letter of credit cases. In addition, the issues raised by the summary judgment motions and this appeal were limited exclusively to whether or not Amwest could meet each of the legal requirements for an unjust enrichment claim. There has never been any need to marshall facts in order to prove, legal issues of ownership aside, which party would be more "deserving" of the disputed funds. As a result, Amwest's conclusion that use of a "windfall" rationale raised no new issues is not supportable, legally or factually.

3. Amwest's reliance on *Helis v. Ward*, 308 U.S. 365 (1939), as authority for denying the writ is clearly misplaced. The Court recognized in *Helis* that the *claimed* due process violation was a sufficient basis for granting the writ. It was nonetheless constrained to affirm the opinion below because the ground for reversal had been waived due to the petitioner's failure to assert it in the petition for rehearing. To suggest that in *Helis* the Court held that no due process violation could occur in the absence of a new trial motion or of proof of new facts is simply silly.[1]

4. Amwest's suggestion that the decision below will have little impact beyond the immediate parties is illogical and conclusory. The Fourth Circuit's implicit recognition that in letter of credit cases, case-by-case decision-making on the basis of broad equitable principles is appropriate constitutes a radical and dangerous departure from traditional law. The commentators quoted in the Petition for Writ of Certiorari testify vigorously to that fact.

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[1] This case was decided on summary judgment, so it is hard to understand how Republic could be expected to have made a new trial motion. Moreover, Republic could not be expected to present proof of facts to the Fourth Circuit which could not have been known to be at issue in this case while discovery was in progress.

CONCLUSION

An appellate court is far more likely to reach a correct and just decision in accordance with the law when those issues which are eligible for consideration are exposed to the rigors of briefing and argument. No court is perfect. And while there may be an occasional case in which, from an abstract academic perspective, a court has managed to reach the correct legal result based upon grounds of its own creation, the mere possibility of a correct result is not sufficient justification for denying a litigant the right to be heard. Indeed, the risk of *incorrect* decisions created by such an unguided process suggests strongly that this Court, as the last court in position to insure justice, should routinely and affirmatively act to address the type of unconstitutional abuse which has occurred in this case. A failure to act can only encourage subordinate courts to employ the type of unfortunate result-oriented approach which has culminated in the dangerous and nearly incomprehensible decision from which appeal is here taken.[2]

The Petition for Writ of Certiorari should be granted, and the decision of the court of appeals relating to unjust enrichment summarily reversed.[3]

Respectfully submitted,

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[2] While the vindication of constitutional rights is the primary justification for intervention by the Court, the fact that the decision below will likely have important precedential consequences also justifies review.

[3] Amwest has not attempted to dispute that in the event the grounds relied upon by the Fourth Circuit were not briefed on appeal, they have been waived, thereby supporting summary reversal.